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EXPLANATION OF TERMS AND ABBREVIATIONS

Petitioner — Walker Process Equipment, Inc. (Defendant-Counterclaimant, Appellant in the Court of Appeals)

Respondent — Food Machinery and Chemical Corporation (Plaintiff-Counterdefendant, Appellee in the Court of Appeals)

PTN — Petition for Writ of Certiorari

DA — Defendant-Appellant's Appendix

PA — Plaintiff-Appellee's Appendix

R — Record in Court of Appeals

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1964.

No. 602

WALKER PROCESS EQUIPMENT, INC.,

Petitioner

vs.

FOOD MACHINERY AND CHEMICAL
CORPORATION,

Respondent

**BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

The Petition sets forth no reason for the Court to exercise its certiorari jurisdiction.

In its original counterclaim (the first of three counterclaims), Petitioner alleged:

"11. Defendant, Walker Process Equipment, Inc., asserts that the patent in suit is unenforceable because Plaintiff comes to court with unclean hands with respect to the patent in suit and is therefore not entitled to relief. Defendant, Walker Process Equipment, Inc., asserts that this also constitutes a violation of the anti-trust laws." (DA 11)

Petitioner seeks to enlist the Court's interest by devoting a considerable portion of its petition to an attempt to establish fraud by Respondent. The alleged fraud consists of Petitioner's claim that the inventor falsely stated in his patent application that there was no prior use or sale of the subject improvements within one year from the date of the application. Although Respondent categorically denies the charge of fraud on the Patent Office, the question of proof of fraud is not before this Court.

There is nothing involved at this stage of the proceedings except the legal sufficiency of Petitioner's thrice remodelled counterclaim, which seeks to convert a defense of unenforceability of a patent into an affirmative action for treble damages under the federal antitrust laws.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 335 F. 2d 315.

JURISDICTION

Petitioner has sought to invoke this Court's jurisdiction pursuant to the provisions of 28 U.S.C. sec. 1254(1).

STATUTES INVOLVED

Petitioner contends (PTN 3) that the following statutes are involved:

Section 2 of the Sherman Act (15 U.S.C. sec. 2) prohibiting monopolies, attempts to monopolize and conspiracies to monopolize.

Section 4 of the Clayton Act (15 U.S.C. sec. 15) providing treble damage actions for persons injured in their business or property by reason of anything forbidden in the antitrust laws.

Section 285 of the United States Patent Code (35 U.S.C. sec. 285) providing that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party."

QUESTIONS PRESENTED

Question No. 1. as stated by Petitioner (PTN 2), if it is to be related to the particulars of the instant case, at best raises a question of whether a patentee's alleged fraudulent procurement of a patent (assuming injury to a third party thereby), affords a third party a private action against the patentee for treble damages under the federal anti-trust laws.

Petitioner omits from Question No. 1. all reference to the federal antitrust laws, and seeks to confine the question to some sort of non-statutory claim for damages. However, the stricken counterclaim must stand or fall as a claim for relief under the antitrust laws.* The only other theory of the claim offered by Petitioner, that it was an action for unjust enrichment, was briefed in the District Court and abandoned by Petitioner in the Court of Appeals.

With the statement of Question No. 2 (PTN 2) it becomes perfectly apparent that what Petitioner really desires is a determination that one who has fraudulently procured a patent has, without more, *per se* violated the federal antitrust laws.

In setting forth its Question No. 3. (PTN 2), and in arguing the point (PTN 12), Petitioner persists in ignoring the fact that the District Court permitted Respondent

* A claim of "illegal tie-ins" which was at least cognizable as a Clayton Act section 3 or a Sherman Act section 1 action was briefed in the District Court but abandoned by Petitioner in the Court of Appeals.

to dismiss its own infringement suit, that there was no adjudication of Petitioner's claim of fraud, and that under such circumstances not only was the case not an "exceptional case" within the meaning of 35 U.S.C. Sec. 285, but in a large sense Petitioner was not even the "prevailing party." The opinion of the Court of Appeals supplies ample reason for not over-turning the District Court's denial of attorneys' fees. Moreover, the issue of attorneys' fees is merely one of judicial discretion and clearly presents no issue warranting review by this Court.

STATEMENT OF THE CASE

The only issue before the Court of Appeals (apart from the tenuous issue of attorneys' fees) was the sufficiency of a revised defense which Petitioner also thrice sought to assert as a counterclaim under the federal antitrust laws. As is apparent from a brief review of the proceedings in the District Court, Petitioner was at no time able to assert an intelligible claim for treble damages under either the Sherman Act or the Clayton Act.

Respondent filed suit for patent infringement on June 24, 1960 against Petitioner.

Petitioner's first pleading captioned "Answer and Counterclaim for Declaratory Judgment" (DA 10) alleged invalidity and non-infringement of Respondent's patent and unenforceability of the patent by reason of "unclean hands." Paragraph 11 (DA 11) contained a gloss in which Petitioner asserted that "this [presumably Respondent's alleged unclean hands] also constitutes violation of the antitrust laws." *No other reference of any kind to purported anti-trust violations was contained in the pleading.*

On October 22, 1962 (Respondent's patent in suit having then expired) Respondent, on its own motion, moved to dis-

miss its suit (DA 59). Petitioner countered by filing on the same day its "Motion for Award of Attorneys Fees" (DA 55).

While Respondent's motion to dismiss and Petitioner's motion for an award of attorneys' fees were pending, Petitioner filed a motion captioned "Motion to Award Damages and Alternative Motion to Amend Counterclaim" (DA 60) (PA 1). Thereafter the District Court filed a memorandum opinion and entered orders granting Respondent leave to dismiss its complaint and denying Petitioner's motion for attorneys' fees (DA 61-64). Leave was also granted Petitioner (DA 64) to file its amended counterclaim instanter.

Thus it was not until some two and one-half years after suit was begun, and after the issues raised by the complaint had become moot and Respondent had sought voluntary dismissal of the complaint, that Petitioner, apparently attempting to protract the litigation and hoping to obtain attorneys' fees from Respondent, sought to amend its counterclaim in an attempt to supply new allegations "sounding in antitrust"—something vaguely concerned with "tie-ins" (PA 3). Petitioner thus appreciated that its original pleading alleging, without more, that Respondent comes to court with unclean hands and that "this also constitutes violation of the anti-trust laws" (DA 11) hardly constituted the pleading of a federal antitrust claim.

On March 20, 1963 Respondent filed a motion to dismiss the amended counterclaim for failure to state a claim upon which relief could be granted. After taking the matter under advisement, the District Court struck the amended counterclaim (R 354) as so prolix and verbose that it failed to comply with Rule 8(e)(1), but granting Petitioner leave to amend (R 412-416).

Petitioner then filed a third counterclaim, its second amended counterclaim (DA 66), and Respondent filed a motion to dismiss the second amended counterclaim (DA 70).

The second amended counterclaim, if it referred at all to "tie-ins," did so only obliquely (DA 68), and was devoid of any suggestion of what kind of conduct the pleader was complaining about or of any consequent injury to Petitioner. In dismissing the second amended counterclaim the District Court readily disposed of the vague tie-in allegations (DA 73), devoting its opinion to the alleged fraud on the Patent Office.

In its brief and argument in the Court of Appeals, Petitioner abandoned any conceivable claim of illegal tie-ins, and with it the last vestige of a conceptually cognizable federal antitrust action. Likewise, Petitioner abandoned the contention, asserted for the first time in the second amended counterclaim (DA 69) that Respondent in making use of its patent was unjustly enriched at Petitioner's expense.

Petitioner was left with nothing to argue in the Court of Appeals but its tenuous claim for attorneys' fees and the theory that unclean hands ("fraud on the Patent Office") is coextensive with violation of the antitrust laws. The second amended counterclaim thus returned to rest at the starting point of the original counterclaim (DA 11, Par. 11). It is manifest, although Petitioner is never candid enough to say so, that it contends, and has never really contended anything more, that procurement of a patent by fraud on the Patent Office is, without more, a *per se* violation of the federal antitrust laws.

ARGUMENT

Under the caption "Reasons for Granting the Writ" (PTN 7), Petitioner numbers its material from 1 to 5. Contentions set forth under the various numbers overlap and do not seem to comprise separate arguments. All of Petitioner's "Reasons" are nonetheless considered in this Argument.

1. There is Nothing of Special Public Importance in the Questions Presented by Petitioner.

Petitioner argues (PTN 7) that "[w]ithout action by this Court, patents may be procured by an applicant's fraudulent representations to the Patent Office, and the illegal monopoly thus obtained asserted against the public with impunity." Such an argument is only a carefree stroke with a big, broad brush. The Court of Appeals concisely and correctly held that although patent misuse may be the basis of an independent antitrust action, the mere procurement of a patent by fraud on the Patent Office, without more, does not afford a third party (assuming *arguendo* that such third party has been injured) a private action for treble damages against the patentee under the federal antitrust laws.

The law is well established that procurement of a patent by fraud invalidates the patent. A third party who may have a conceivable interest in the matter is free to infringe or to make any other use it desires of the purportedly patented device. In such circumstances, if the party holding the fraudulently procured patent, *i.e.*, the invalid patent, sues the third party for infringement, the third party may successfully defend the infringement suit on the basis

of invalidity. This is the usual, normal and typical situation respecting all disputes over the validity of patents. There is nothing *sui juris* about invalidity occasioned by fraud on the Patent Office in contrast to invalidity by reason of lack of invention, insufficient disclosure, or invalidity for any other reason.

The Court of Appeals pointed out (as did the District Court) that if Petitioner had any claim of any nature, its claim was based on proving fraud by Respondent on the Patent Office, in which event Respondent's patent was invalid.

The purported fraud is bottomed on a statutory bar to issuance of the patent; that is, Petitioner alleges that Respondent in its patent application falsely stated that it "does not know and does not believe that the same [the subject improvements] was . . . in public use or on sale in the United States for more than one year prior to this application." (paras. 17, 18 DA 67)

If there had been in fact a public use or sale more than one year prior to Respondent's application the patent would be invalid on such grounds, regardless of alleged fraud by Respondent. It is not the alleged fraud that might make the patent invalid, but the underlying fact of prior public use or sale (Patent Act, section 102(b), 35 U.S.C. sec. 102-b).

In December of 1956 Petitioner, by its counsel, wrote Respondent claiming that Respondent's patent was invalid by reason of prior public use and Respondent by its counsel, of course, denied any duty to investigate the question for the benefit of Petitioner (DA 67). Then as now the alleged invalidity was not dependent upon fraud, but upon the factual question of prior public use or sale. Then as now, if the patent were invalid and if, as asserted, Respondent's

patent interfered with or injured Petitioner in any manner whatever, Petitioner was perfectly free to manufacture a device that would infringe or involve contributory infringement (and to set up invalidity as a defense if Respondent should sue) or to seek a declaratory judgment if Respondent complained of infringement.*

However, to claim many years later, as in the instant suit, by way of defense and counterclaim that the possible invalidity, as such and without more, creates a wholly new and separate action for violation of the federal antitrust laws is specious. On such a theory any patentee whose patent is held invalid has violated the antitrust laws. The alleged invalidity then, and not the reason for the invalidity, is what Petitioner really claims creates a treble damage action under the antitrust laws. Stripped to its gravamen the argument means that any active claim of patent which turns out to be invalid is a violation of the federal antitrust laws.

It is telling to note, too, that Petitioner does not provide the court with the slightest suggestion of any distinction between "a monopoly represented by a fraudulently obtained patent" and "a monopoly represented by an invalid patent." Petitioner's argument is equally applicable to both and, as thus revealed, is completely untenable. Accordingly, not only is it of no public importance that Petitioner's claim of remedy be sustained but, on the contrary, if there is anything of importance involved, it is important that no such remedy be created.

* The evidence in the record shows that Petitioner itself was manufacturing and selling similar devices for raising diffusing means from an aeration tank—single pivot swing risers and hoists for swing risers (PA 4).

2. There is No Conflict Whatever between the Decision of the Court of Appeals and this Court's Decision in *Shawkee Mfg. Co. v. Hartford-Empire Co.*

Petitioner's effort to place the decision of the Court of Appeals in conflict with the decision in *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 322 U.S. 271 is equally untenable.

Instead of reviewing the holdings in that and related cases, Petitioner is satisfied to suggest that the case means that a right to damages on some theory exists (PTN 9).

This court's decision in the underlying case of *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 involved only the power of the Court of Appeals to vacate its own judgment where the judgment was procured by fraud. The issue was the same in *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 322 U.S. 271, and there is nothing in the decision suggesting that a third party has a private action for damages against a patentee by reason of the patentee's procurement of its patent by fraud. Petitioner's misconception that damages by reason of "fraudulent procurement of a patent" were allowed in the litigation probably stems from the proceedings following the Supreme Court decision in the *Hazel Atlas Glass Co.* case, as reflected in *Hartford-Empire Co. v. Shawkee Mfg. Co.*, 163 F. 2d 474 (CA 3). Damages were not allowed for such purpose; the Court of Appeals held that the fraudulently obtained injunction had forced several parties to renew their royalty contracts with *Hartford-Empire*, and that they were thus entitled to restitution of the amounts paid. All claims for loss of profits or compensatory damages were rejected as speculative. The court, however, indicated that, in view of the "whole wretched scheme" punitive damage would be allowed.

Petitioner would have the court overlook the material differences between the *Hartford-Empire* litigation and the

instant case. (i) The actions permitted in *Hartford-Empire* arose from fraudulent procurement of a judgment—not from “fraud on the Patent Office”; there is no suggestion whatever that “fraud on the Patent Office,” without more, was considered to be actionable by a private party or to be a violation of the federal antitrust laws. (ii) The parties to whom punitive damages were allowed had been directly defrauded by *Hartford-Empire* in the course of litigation instituted by *Hartford-Empire* for the express purpose of defrauding such parties and affecting their pecuniary and property rights, which circumstances, of course, afford a cause of action; pointedly, in the instant case, there is no allegation that Respondent defrauded Petitioner, but only that Respondent defrauded the Patent Office.

As revealed at page 9 of its petition, Petitioner is not making use of the *Hartford-Empire* litigation to argue genuinely a conflict of results between Circuits, but to plaintively suggest to this Court, as it did to the Court of Appeals, that although Petitioner can find no theory upon which it is entitled to relief (other than its antitrust theory), this Court should supply it with a theory.

3. The Question of Affirmative Relief by a Third Party Allegedly Injured by Another Party's Fraudulent Procurement of a Patent has Long Ago Been Settled by this Court.

Petitioner (PTN 9) reads the Court of Appeal's observations that Walker [Petitioner] cites no authority in support of its theory to mean that the Court of Appeals regarded the purported issue as open. No such reading is possible. The Court of Appeals correctly relied upon established authority in denying an affirmative cause of action to Petitioner.

The cases are uniform in holding that the United States, but no other party, may sue to revoke or set aside a patent

procured through "fraud on the Patent Office." *United States v. American Bell Telephone Co.*, 128 U.S. 315, 373; *Eckert v. Braun*, 155 F. 2d 517, 519 (CA 7); *United Mfg. Service Co. v. Holwin Corp.*, 13 F.R.D. 510 (D.C.N.D., Ill.)

The Patent Office itself is not empowered to revoke a patent once issued, whether on the ground of fraudulent procurement or for any other reason. *Minnesota Mining & Manufacturing Co. v. Coe*, 145 F. 2d 25 (App. D.C.), *cert. den.* 323 U.S. 799.

The origins of the doctrine that only the United States may sue to revoke or annul a patent are found in *Mowry v. Whitney*, 81 U.S. (14 Wall.) 434, a case decided by this Court in 1871. The Court held that, in the absence of a permissive proviso in the then current Patent Act, a private party was without standing to seek annulment of another party's patent because of alleged fraud on the Patent Office. The only question remaining after *Mowry v. Whitney* was whether the United States had standing to sue for annulment of a patent under such circumstances and this question was resolved affirmatively in the *Bell Telephone* case cited above, 128 U.S. 315, 373.

Accordingly, as clearly understood by both the District Court and the Court of Appeals, a private damage claim for alleged fraudulent procurement of a patent is a collateral attack on the validity of the patent, *viz.*, an attempt to nullify it or, in effect, to cancel it. Such an attack may not be made by a private claimant seeking affirmative relief.

4. Obtaining of a Patent by Fraud on the Patent Office is Not, Without More, a Violation of the Federal Anti-trust Laws.

Petitioner seriously argues (PTN 11, 12) that since "the practice of fraud on the Patent Office, or at least the charge thereof, is not of infrequent occurrence" *ergo* this court should deem "such practice" to be a violation of the anti-trust laws. Although the "frequency" of the practice is, of course, doubtful, whether or not any provision of the federal antitrust laws is *per se* violated in such circumstances is an entirely different matter.

In all the many pleadings and briefs filed to date by Petitioner it has not, until its statement of Question No. 2. (PTN 2), revealed what provisions of the federal antitrust laws it deems applicable. Question No. 2., however, now clearly asks for an adjudication that fraud on the Patent Office in the procurement of a patent is *per se* a violation of Section 2 of the Sherman Act.

Assuming, however, that procurement of a patent by fraud on the Patent Office may constitute "unclean hands" or "patent misuse," and assuming that some instances of "unclean hands" or "patent misuse" amount to violations of the antitrust laws, it does not follow that every instance of unclean hands or of patent misuse or of claimed patent abuse is a violation of the federal antitrust laws. Compare *Morton Salt Co. v. Suppiger*, 314 U.S. 488, 490, 492; *Transparent Wrap Machine Corp. v. Stokes & Smith Company*, 329 U.S. 637, 641; *United States Gypsum Co. v. National Gypsum Co.*, 352 U.S. 457, 465.

The logical relation of patent misuse to antitrust violations is summed up in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), page 254. The Committee said:

"We reject the view that any violation of patent law necessarily violates the antitrust laws. From some abuses of patent policy may flow consequences not drastic enough to meet antitrust prerequisites of effect on competition. In addition, many patent abuses are more effectively curbed by simply denying equitable relief as a matter of patent policy. Holding every patent law transgression to be at the same time an antitrust violation would, moreover, put the patent owner on a different footing than owners of other property subject to antitrust. For antitrust has its own measure of permissive and wrongful conduct. To say that action beyond the borders of the patent grant is a *per se* antitrust violation is to ignore the Supreme Court's distinctions between the variant statutory standards of the Sherman, Federal Trade Commission and Clayton Acts as well as to repudiate the body of interpretations distinguishing between offenses unreasonable *per se* and those not."

In sum, Petitioner cannot by the simple device of labeling its claim an antitrust action "bootstrap" its now moot defense of unenforceability of the patent into a treble damage suit under the federal antitrust laws.

Over the years this Court has given elaborate and careful attention to the question of illegality *per se* under the Sherman Act. Certain practices, by their very nature, have been held to be so unduly restrictive that they are to be deemed illegal *per se* and any inquiry into their reasonableness is foreclosed. These practices are price fixing (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210); division of markets (*United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, *aff'd.* 175 U.S. 211); group boycotts (*Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457); and tying arrangements (*Northern Pacific Railway Co. v. United States*, 356 U.S. 1).

With these exceptions, for a practice to violate either section 1 or 2 of the Sherman Act it must be condemned as unduly or unreasonably restrictive. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1.

Finally, Petitioner has sought to generate confusion throughout the proceedings by equating the special privilege granted to an inventor with a monopoly consummated by a successful trade predator. These two concepts denote entirely different economic realities and are hardly coextensive for all purposes. See for example, *United States v. Dubilier Condenser Corporation*, 289 U.S. 178, 186. See also Report of the Attorney General's National Committee to Study the Antitrust Laws (p. 14 hereof).

5. The Stricken Pleading Does Not Set Forth a Claim for Relief Based Upon an Unreasonable Restraint of Trade under the Sherman Act.

Unless a practice is illegal *per se*, in order to determine whether it is unlawful under either section 1 or section 2 of the Sherman Act it is first necessary to describe, define or delineate the relevant market area. *Brown Shoe Company v. United States*, 370 U.S. 294, 325 and cases cited therein; *United States v. E. I. duPont deNemours & Co.*, 353 U.S. 586, 593.

Not only does the stricken second amended counterclaim fail to suggest a relevant market area, but it is also lacking in appropriate allegations of subject-matter jurisdiction. Federal regulation of commerce stems from the constitutional power to regulate interstate and foreign commerce. Nowhere does the pleading set forth an intelligible description of business practices or transactions in some way involving, relating to, or affecting any line or area of interstate or foreign commerce.

Cameron Iron Works, Inc. v. Edward Valves, Inc., 175 F. Supp. 423 (D.C. Tex.) is a pointed example of application of the relevant market requirement in a case similar to this case. In that case plaintiff sued to enforce its patent covering certain improvements in valves for controlling the flow of abrasive-laden fluids. Defendant relied on the usual patent defenses and filed a counterclaim charging plaintiff with attempting to monopolize the market in valves "sized especially for mudline service and having resilient sealing surfaces which render them capable of effectively controlling the flow of abrasive-laden fluids circulated in the mud supply system of drilling oil wells." The court found, however, that the evidence failed to show that any separate market existed in valves with resilient sealing surfaces for mudline service but rather that such valves in fact competed with valves having metal to metal seals.

Unlike the instant case, the *Cameron* counterclaim at least attempted to define the market area in which trade was allegedly monopolized. *Cameron* illustrates, however, that not every device or product comprises a market area in and of itself.

6. The Question of Attorneys' Fees does not Justify Review by this Court.

The District Court observed, "[w]e do not have admitted or adjudicated fraud vitiating the validity of the patent." The Court of Appeals observed that "[t]he District Court analyzed Walker's case and the applicable law when ruling on Walker's motion for fees. This analysis obviates the idea of arbitrariness." A District Court's exercise of discretion in granting or denying attorneys' fees is hardly a proper cause for exercise of this Court's certiorari jurisdiction.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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